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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No.

C. JON HANDY,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Appellee,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on October 20, 1971 and amended on March 22, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 454 F 2d 885 (1972). Said opinion is printed and attached hereto and made a part hereof as Appendix A and B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 and Rule 19.1 (b), Supreme Court Rules in order to decide a grave constitutional question of great public interest which has not heretofore been, but should be, settled by this Honorable Court and to resolve conflict between the various Courts of Appeals

on the same matter.

The United States Court of Appeals for the Ninth Circuit affirmed the conviction of petitioner on October 20, 1971. Petitioner's petition for re-hearing and suggestion for appropriateness of hearing en banc was denied by amended Order on March 22, 1972 (infra Appendix B). An Order extending time to file Petition for Writ of Certiorari to and including May 20, 1972, was granted by this Honorable Court on April 18, 1972, by Mr. Justice Douglas.

All questions raised in this instant petition were raised in the Court below and on appeal to the Ninth Circuit Court of Appeals.

CONSTITUTIONAL PROVISIONS

1. The Constitutional provisions involved are the Sixth and Fifth Amendments to the United States Constitution. They are printed in 1 U.S.C. XLVI. The Sixth Amendment provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

QUESTIONS PRESENTED

I. This Court Should Grant Certiorari To Determine Whether A Psychiatric Examination To Which The Defendant Is Compelled To Submit Himself By The Court During The Course Of The Trial, At The Request Of The Government, Is A Critical Stage At Which The Defendant In A Criminal Proceeding Is Entitled To Have His Attorney Present.

II. This Court Should Grant Certiorari To Determine Whether Petitioner Was Unconstitutionally Deprived Of His Sixth Amendment Right To Counsel And His Fifth Amendment Right Against Self-Incrimination.

III. This Court Should Grant Certiorari To Determine Whether The Trial Court's Order, Over Defendant's Objection, Compelling Defendant To Answer Questions Of and To Fully Cooperate With Court Appointed Psychiatrist Or To Forfeit His Right To Present Expert Testimony On The Issue Of His Insanity Is Unconstitutional.

IV. This Court Should Grant Certiorari To Settle Conflicts, Confusion and Uncertainty Among the Circuit Courts Of Appeal With Respect To The Guidelines Required To Be Established By The Trial Court Governing The Examination Of A Defendant By a Psychiatrist Appointed By the Court At The Request Of The Government.

STATEMENT OF THE CASE

The course of the proceedings, and the facts, insofar as they are pertinent to the questions presented by this Petition, are as follows: 1/

A. The Course of the Proceedings

By indictment filed in the United States District Court for the Central District of California, in Case No. 5667, Petitioner was charged with wilfully and knowingly submitting to an Internal Revenue Agent, a false and fraudulent Management Fee Agreement in violation of 18 U.S.C. Section 1001. In Case No. 37429, Petitioner was charged, in five Counts, with wilfully and knowingly attempting to evade corporate income taxes for the years 1964 and 1965, in violation of 26 U.S.C. Section 7201 (Counts One and Two); assisting in the preparation and presentation of false and fraudulent returns filed by Palm Springs Panorama, Inc., a corporation, for the years 1964 and 1965, in violation of 26 U.S.C. Section 7606 (2) (Counts Three and Four); and filing a false and fraudulent return for the year 1965 on behalf of Petitioner and his wife, in violation of 26 U.S.C. Section 7201 (Count 5). 2/

The indictments were consolidated for trial and following an extensive and complicated trial which consumed 15 days, the jury found Petitioner guilty in Case No. 5667 and guilty of the first four Counts in Case No. 37429. Petitioner was sentenced to the custody of the Attorney General for a period of five years on each of the Counts, the sentences to run concurrently.

1/ For a more detailed recitation, this Court is respectfully referred to the Opinion of the United States Court of Appeals for the Ninth Circuit, which is made a part hereof as Appendix "A" and "B".

2/ Petitioner was acquitted on Count Five of this indictment.

B. Statement of Facts

Although the financial transactions at the core of Petitioner's criminal case were simple in outline, the facts and contentions relating thereto were complex. Indeed, they were so complicated and involved that the Government consumed 11½ days presenting their facts and defendant 3½ days presenting psychiatric evidence. Furthermore, the complexity of the case was compounded by the testimony of six doctors, two of whom were court appointed, in connection with Petitioner's insanity defense. The two court appointed psychiatrists were appointed and defendant was compelled over defendant's objection, to meet with them and discuss the facts of the case with them without his attorney despite his Sixth Amendment right to counsel.

The Trial Court's Orders 3/appointing the two psychiatrists each provided, inter alia, that the Petitioner present himself at designated times and places, as each psychiatrist might deem necessary; that Petitioner afford "such cooperation and information as may be required by said doctor properly to conduct the mental examination" and that "such examination shall not be in the presence of any counsel or stenographer designated by defendant". (Emphasis supplied)

Each of said Orders additionally provided that if Petitioner did not comply with the Orders, he "shall be precluded at trial from presenting testimony upon the issue of his alleged mental incapacity by any expert by whom he has been interviewed".

All but one of the psychiatrists testified that, at the time of the alleged commission of the crimes, Petitioner was suffering from chronic paranoid schizophrenia, that Petitioner lacked substantial capacity to appreciate the

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3/ True copies of the Orders appointing psychiatrists Davis and Deering, filed September 4, 1970, and being pp. 501-502 and pp. 511-512 of the Clerk's Record on Appeal are reproduced and made a part hereof as Appendix "C".

wrongfullness of his conduct, that Petitioner lacked substantial capacity to conform his conduct to the requirements of the law, that Petitioner was not in control of his actions and therefore, could not have a criminal intent to defraud the Government and that Petitioner met the legal definition of insanity in all respects. Dr. Deering, the one psychiatrist who failed to join in the unanimous opinions of the other five doctors, dissented rather than concurred from the aforesaid consensus. Although he diagnosed Petitioner as suffering from an obsessive compulsive neurosis, he also concluded that his diagnosis was extremely difficult since Petitioner was a "sick man", since Petitioner's obsessive compulsive neurosis had many features similar to chronic paranoid schizophrenia, since Petitioner was sick since the age of two, and since Handy was engaged in "self-destructive behavior".

As is evident from a reading of the Court's Orders appointing the psychiatrists, (Appendix "C" hereof) Petitioner was precluded from having counsel, or a stenographer, present at the examination but the Orders did not preclude the prosecution having counsel and/or a stenographer present during the examination. It cannot be fairly ascertained from the record whether or not counsel for the Government or a Government stenographer were actually present during the psychiatric examinations of the Petitioner, as ordered by the Court. However, the record is clear that following a first examination of the Petitioner, by court appointed psychiatrist Dr. Deering, the doctor met with the prosecutor on two occasions, during one of which the prosecutor delivered certain "papers" to the doctor's office. (Tr. 2247) 4/ 5/

4/ "Tr.". when used hereafter, refers to the Reporter's Transcript of Proceedings at trial.

On one occasion, the prosecutor asked the doctor to examine the Petitioner a second time. Dr. Deering thereafter, did perform a second examination of the Petitioner. (Tr. 2274) 6/

5/ Although the nature and identity of some of the "papers" delivered by the prosecutor to Dr. Deering were made known during the course of the Cross-Examination of Dr. Deering at the trial, it cannot be ascertained from the record whether or not the prosecutor delivered other papers or documents, not alluded to in the proceedings. to the doctor. It is here noteworthy that one of the "papers" which was delivered to Dr. Deering by the prosecutor was a transcript of the prosecutor's Opening Statement to the jury. We are hard pressed to determine why a prosecutor's Opening Statement was in any way essential to the doctor's diagnosis of the Petitioner, while the Opening Statement of Defense Counsel (which apparently was not given to the doctor by the prosecutor) was somehow immaterial to the diagnosis. It is additionally noteworthy that while the doctor accepted the "papers" proferred to him by the prosecutor, the doctor declined to accept, or to look at, certain "papers" which were offered to him by the Petitioner.

6/ Although the reasons for, or the necessity of, a second examination of Petitioner by Dr. Deering were not alluded to at the trial, and would be matters of conjecture, one might perhaps speculate that the prosecutor was somehow unhappy with the results of Dr. Deering's first examination of the Petitioner. It is noteworthy that after the second of the examinations had been performed, Dr. Deering testified that the Petitioner was sane at the commission of his offenses, whereas, all of the five other experts, including court appointed Dr. Davis, testified that Petitioner was insane. (Dr. Deering did agree with defense counsel, on Cross-Examination that there was no question but that the Petitioner was a sick man; that there was no question but that his diagnosis had been an extremely difficult one to make; and that Petitioner could have been insane during 1964, 1965, and 1966. (Tr. pp. 2247 and 2275).

SUMMARY OF ARGUMENT

Reasons For Granting The Writ

A mid-trial psychiatric interview to which a defendant whose sanity is in question is compelled to submit, under penalty of effectively forfeiting his insanity defense, is a crucial stage of the proceedings and the presence of counsel is therefore essential to protect the integrity of the fact-finding process at the trial itself.

In light of the rationale of United States v. Wade, such psychiatric interview is so fraught with danger so as to require the guiding hand of counsel during the proceeding.

This Petition seeks to have this Court now hold that a Court appointed psychiatric examination of a defendant whose sanity is in question, is a "critical" stage of the proceedings and that in such a situation the defendant should be afforded the "guiding hand of counsel" in the very psychiatric examination upon which hinges his guilt or innocence.

ARGUMENT

Sixth Amendment Right To Counsel

I A PSYCHIATRIC EXAMINATION TO WHICH THE DEFENDANT IS COMPELLED TO SUBMIT HIMSELF BY THE COURT DURING THE COURSE OF THE TRIAL, AT THE REQUEST OF THE GOVERNMENT, IS A CRITICAL STAGE AT WHICH THE DEFENDANT IN A CRIMINAL PROCEEDING IS ENTITLED TO HAVE HIS ATTORNEY PRESENT.

A. The Cases Decided By This Court Compel the Conclusion That Petitioner Should Have Been Afforded The Right To Counsel.

The right of defendants in criminal cases to be afforded the "guiding hand of counsel" at crucial pretrial, trial and post-trial stages of a criminal proceeding, has received the expanding protection of the courts during recent years.

The right to counsel, commencing with Gideon 7/, held that a defendant could not be assured a fair trial in the absence of counsel. By virtue of a plethora of decisions following Gideon, this Court has now extended the right to counsel to an individual suspect subjected to surreptitious interrogation. 8/ In addition, both the arraignment 9/ and the time of entering a plea 10/ have been determined to be "critical stages" requiring the presence of counsel.

This Court has guaranteed that even a suspect (not yet a defendant) is entitled to counsel prior to, and during interrogation 11/as well as

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7/ See Gideon v. Wainwright, 372 U.S. 335 (1963)

8/ See Massiah v. United States, 377 U.S. 200 (1964)

9/ See Hamilton v. Alabama, 368 U.S. 52 (1961)

10/ See White v. Maryland, 373 U.S. 59 (1963)

11/ See Escobedo v. Illinois, 378 U.S. 478 (1964) and Miranda v. Arizona, 384 U.S. 436 (1966)

during the course of a lineup. 12/ The right of a defendant to counsel at a preliminary hearing has recently been given expression. 13/ The right to counsel during trial has, of course, been recognized for sometime. 14/ The right to counsel was then expanded to afford criminal defendants the assistance of counsel in post-conviction appeals, 15/ and even on a Petition for a Writ of Certiorari. 16/

The right to counsel at photographic identifications has been recognized by the United States Court of Appeals. 17/ This Court has further guaranteed the right to counsel in non-criminal juvenile court proceedings. 18/

The right to counsel has further been guaranteed in proceedings which are neither criminal nor quasi-criminal. Thus, the right has been expanded to include an alien in a deportation proceeding; 19/ an employee in National Labor Relations Board proceedings; 20/ a doctor or

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12/ See United States v. Wade, 388 U.S.218 (1967) and Gilbert v. California, 388 U.S. 263 (1967)

13/ See Pointer v. Texas, 380 U.S. 400 (1965) and Coleman v. Alabama, 399 U.S. 1 (1971)

14/ See Powell v. Alabama, 287 U.S. 45 (1932) and Gideon v. Wainwright, 372 U.S. 335 (1963)

15/ See Douglas v. California, 372 U.S. 353 (1963)

16/ See Doherty v. United States, 30 L Ed 2d 149; 92 S Ct 175 (1972) and Schreiner v. United States, 30 L Ed 2d 222; 92 S Ct 326 (1972)

17/ See United States v. Zeiler, 427 F 2d 1305 (3d Cir 1970)

18/ See Re Gault, 387 U.S. 1 (1967)

19/ See Whitfield v. Hanges, 222 F 745 (8th Cir. 1915); and Hyun v. Landon, 219 F 2d 404 (9th Cir. 1954)

20/ See Great Lakes Screw Corp. v. NLRB, 409 F 2d 375 (7th Cir. 1969)

dentist in license revocation proceedings; 21/ a liquor licensee; 22/ and in numerous other proceedings before various boards or administrative agencies.

It has also been recognized that the mentally infirm are entitled to counsel in proceedings involving their commitment to or release from an institution, 23/ and probationers and parolees have recently come under the protective umbrella of the Sixth Amendment. 24/ Even welfare recipients have been afforded counsel's protection. 25/

It is thus apparent that the Sixth Amendment right to counsel has been guaranteed and implemented by this Court to afford the protection of counsel from the time that one becomes a suspect, through and including appeal and other post conviction proceedings.

1. Sixth Amendment Guarantee Attaches At All Critical Stages of the Proceedings

The foregoing decisions of this Court flowed from a recognition of the fact that proceedings prior to trial may well settle the accused's fate, thus reducing the trial itself to a mere formality. Thus, this Court pointed out in United States v. Wade, 388 U.S. 218, 224:

21/ See Fallon v. Wyoming State Board of Medical Examiners, 441 P 2d 322 (1968) and Bancroft v. Board of Governors of Registered Dentists, 202 Okla. 108 (1949)

22/ See Givens v. Dept. of Alcoholic Beverage Control, 176 C A 2d 529 (1959)

23/ See Heyford v. Parker, 396 F 2d 393 (10th Cir. 1968)

24/ See Mempa v. Rhay, 389 U.S. 128 (1967)

25/ See Goldberg v. Kelly, 397 U.S. 254 (1970)

> "In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings."

This Court further, in U.S. v. Wade, supra, defined the term "critical stage of the proceedings" as follows: (388 U.S. 218 at 226)

> "The accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." (Emphasis supplied)

It is clear that a defendant's right to counsel at a given stage in a criminal prosecution is not linked "only to protection of Sixth Amendment rights", but rather, the essential elements are "whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and ability of counsel to help avoid that prejudice" (United States v. Wade, Supra, at 227).

Thus the question presented by this petition is whether a psychiatric examination of a defendant, ordered by the Court during the course of a criminal trial, is a "critical" stage of the proceedings. For reasons that we shall point out herein, it is most respectfully submitted that the very psychiatric examination upon which may well hinge a defendant's guilt or innocence is indeed a "critical" stage of the proceedings, and that in such a situation, the defendant should be entitled to the "guiding hand of counsel" during the course of a psychiatric examination of that defendant compelled by the Court during the course of a criminal trial.

2. POWELL Proves to Be Prophetic In Case At Bar.

Indeed, this Court, as long ago as 1932, recognized that it is the duty of the courts to

protect the ignorant, the feeble-minded, the illiterate and those otherwise incapable of adequately protecting themselves, by providing adequate counsel to assist and guide them in their defense. In a statement which has now proven to be prophetic, this Court said, in Powell v. Alabama, 287 U.S. 45, 71:

> "All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."

What this petition seeks is to have this Court now hold that a defendant whose sanity is in question, be afforded the guiding hand of counsel in the very proceeding upon which hinges his guilt or innocence.

B. A COMPELLED COURT ORDERED PSYCHIATRIC EXAMINATION, DURING THE TRIAL OF A DEFENDANT IS FROUGHT WITH EVEN MORE POTENTIAL DANGER THAN THE INTERROGATION, IDENTIFICATION OR OTHER PRETRIAL PROCESSES.

1. Throughout the Right To Counsel Decisions in Gideon, Massiah, Miranda, Escobedo, Wade, Gilbert, and Coleman, There Runs the Thread Of Recognition That Counsel Is Essential To Protect the Integrity of The Fact Finding Process At The Trial Itself.

The potential prejudice which might inure to a criminal defendant (suspected to be insane)

at a psychiatric examination by a court appointed or government psychiatrist, in a situation where the defendant is required to proceed without the presence of his counsel or a record is readily apparent.

This Court has recognized the necessity of counsel to protect against suggestive influences. In United States v. Wade, 388 U.S. 230-232:

> "In any event, neither witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect. And if they were, it would likely be of scant benefit to the suspect since neither witnesses nor lineup participants are likely to be schooled in the detection of suggestive influences. Improper influences may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers. Even when he does observe abuse, if he has a criminal record he may be reluctant to take the stand and open up the admission of prior convictions. Moreover, any protestations by the suspect of the fairness of the lineup made at trial are likely to be in vain; the jury's choice is between the accused's unsupported version and that of the police officers present. In short the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness courtroom identification." (Emphasis supplied) (citations omitted)

The psychiatric interview presents a fact finding process which is no less fraught with danger of suggestive influences, improper conduct and difficulty of reconstruction, than the lineup involved in Wade. No less than a lineup, the psychiatric confrontation "is peculiarly riddled with innumerable dangers and variable

"factors which might seriously, even crucially, derogate from a fair trial " (United States v. Wade, Supra, at 228).

2. THE PSYCHIATRIC EXAMINATION INVOLVED HERE WAS A "CRITICAL STAGE" OF THE CRIMINAL TRIAL (PROCEEDINGS)

In enumerating the various areas of potential prejudice inherent in the reliability of the fact-finding process of the psychiatric confrontation, "where counsel's absence might derogate from the accused's right to a fair trial", we have chosen the following "variable factors" to portray why the defendant whose sanity is in question requires the aid of counsel:

a) The defendant would undoubtedly be devoid of any ability to determine at some point during the interview (should the same become necessary) that it is in his best interests to invoke his Fifth Amendment privilege and terminate further inquiries (even at the price, as here, of having his insanity defense stricken). The presence of counsel would ensure that such decision was an enlightened one and made with a full knowledge of all of the legal and other ramifications inherent in the invocation.26/

b) By virtue of the inherent imbalance of psychiatric expertise which exists between the two parties present at such examination, the alienist could completely dominate and maneuver the defendant in his recitation, the defendant being continually at a loss to ever relate the actual proceedings to either his counsel, or in court. 27/

26/ We do not intimate that defendant's counsel should be permitted to voice objections to the psychiatrist's questions, or to otherwise interfere in any manner with the examination. The presence of counsel, however, would most definitely ensure that the defendant's Fifth Amendment rights would be protected and timely invoked should the necessity therefor arise.

27/ Reliance upon the doctor to protect the interests of the defendant is an inadequate substitute for the presence of conscientious counsel.

c) Behind the closed doors of the psychiatrist's office, an unscrupulous but skilled practitioner could hypnotize or otherwise brainwash an unprotected defendant. 28/

d) The same skilled, yet unethical psychiatrist could so design the interview, through the power of suggestion, so as to convince a suggestible defendant that the defendant actually committed the crime, where, absent such suggestion, the defendant had no recollection of any of the acts. 29/

e) The interviewing psychiatrist might, in the absence of counsel, spend only a brief few minutes (or for that matter, no time at all) with the defendant and thereafter testify at the trial as to the factual basis for his finding. 30/

28/ Defense counsel's being permitted to record and observe the proceedings in an adjoining room through the use of a one-way mirror and being permitted to interrupt the interview only for the purpose of advising his client with respect to the invocation of the client's Fifth Amendment privilege, would thus, not only ensure the defendant's Sixth Amendment rights while also preserving the privacy and dignity of the examination, but would also be a solution to the contention that the presence of defense counsel in the room during the psychiatric interview would impede or otherwise interfere with the examining process.

29/ Petitioner would suggest that a proper method for recordation of the proceedings at the psychiatric interview, and one which would not in any way interfere with the examining processes, would be to record the entire examination on video or audio tape. Thus, should any question arise later as to the propriety or conduct of the examination or any part thereof, the trial court could (in an in-camera proceeding, just as is done in cases involving confessions or the discovery of evidence in the hands of prosecution) review the video or audio tape for the purpose of determining whether or not the course of the interview proceeded in such a fair or proper manner so as to permit the psychiatrist to testify as to his conclusion on the issue of sanity.

f) A defendant would undoubtedly experience serious difficulty in reconstructing the questions, answers and nuances involved in the interview.

g) A defendant could not possibly relate to counsel, so as to effectively assist counsel in the cross-examination of the psychiatrist, the amount of time interval between each question of the psychiatrist and the answer of the defendant (a factor which counsel understands to be of some importance in psychiatric practice).

h) The defendant might reveal 100 facts during the interview, 5 of which support the psychiatrist's conclusion of sanity and 95 which would support the contrary view of insanity. 31/

i) A defendant unaided by counsel might not recognize that the psychiatrist's failure to inquire adequately into a detailed history of the patient would invalidate or otherwise impune the credibility of the psychiatrist's ultimate conclusion.

j) A skilled "prosecution" psychiatrist examining a defendant can readily talk the defendant into (or coerce) the defendant to "confess" his guilt which he otherwise would not have done absent the compelled examination.

Cont.

30/ One could hardly expect a defendant, untrained in the art, to recognize that a proper psychiatric evaluation involves a more lengthy discourse between examiner and patient.

31/ The presence of defense counsel or the recordation of the proceedings would ensure a full and accurate record of the questions and answers so that defense counsel on cross-examination might be able, at the trial, to establish by the psychiatrist's own testimony, that the greater weight of the facts elicited at the psychiatric interview balance in favor of the conclusion insanity.

k) Supposing that during the course of a psychiatric interview the psychiatrist questions the defendant as to other crimes.

i) The defendant is incriminating himself and/or faces the possibility of additional charges;

ii) Even if for some reason additional charges could not be filed, for example, i.e., statute of limitations, the defendant's background revelations could come before the jury, thus leading the jury to believe that the defendant is more likely to be guilty of the present charge.

l) The interviewing psychiatrist testifies that the defendant told him, during the interview, of having engaged in some immoral conduct, and in thus relating the patient's history to the jury, as the basis for the psychiatrist's opinion, the jury is inflamed or otherwise prejudiced.32/

i) The presence of counsel or a record of the proceedings might reveal that no such history was ever, in fact, given by the patient. 33/

32/ A more intelligent cross-examination of the court appointed psychiatrist could be conducted by the presence of counsel at the interview.

33/ The Court of Appeals has recognized in Thornton v. Corcoran, 407 F 2d 695, 702, that defense counsel in insanity cases are "frequently unable to examine government witnesses with sophistication" and that "much greater attention must undoubtedly be devoted to the discovery of devices where this lack of sophistication on the part of the bar can be combatted. An obvious starting point in the search is the hospital where the defendant receives a psychiatric examination."

We shall not burden this Court further with a lengthy recitation of the additional possibilities which might be reiterated (or cited) to demonstrate the possibility of prejudice to the reliability of the fact-finding process at a compelled psychiatric examination.

> "In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." United States v. Wade, 388 U.S. at 230-232.

Indeed, the absence of defendant's attorney, at the time he was interviewed by the Government's psychiatric witness, is a "critical stage" and the presence of defendant's attorney must aid in the reliability of the fact-finding process.

C. DUE PROCESS AND THE MEANING OF THE SIXTH AMENDMENT CLAUSE MANDATES REVERSAL "WHERE COUNSEL'S ABSENCE MIGHT DERROGATE FROM THE ACCUSED'S RIGHT TO A FAIR TRIAL."

The Court's Order appointing psychiatrist to examine the petitioner which specifically precluded the presence of defense counsel at the examination, while being silent with respect to the presence of Government counsel, vitiated the essential fairness of the proceedings and deprived petitioner of due process of law and his right to counsel.

In a case in which sanity is raised as an issue, can it be seriously argued that there can be any more critical stage than at a court appointed psychiatric examination of the defendant?

In short, the presence of counsel is part and parcel of a fair trial is also manifested in the Court's persistent refusal to search the record of a trial for prejudice, once the right to counsel is shown to have been violated. Glasser v. United States, 315 U.S. 60, 75, 76

(1942); Reynolds v. Cochran, 365 U.S. 525, 531 (1961); White v. Maryland, 373 U.S. 59 (1963); United States v. Wade, 388 U.S. 218, 236 (1967); Chapman v. California, 386 U.S. 18, 23 (1967).

1. Barring Defendant's Attorney From A Government Requested, and Court Compelled Psychiatric Examination is Constitutionally Impermissible In That It Severely Limits Counsel's Right To Cross-Examine the Key Government's Witness (Without Whom The Defendant Could Not Have Been Convicted) Because There Is No Record Of What The Defendant Said.

The failure of counsel to be present at deposition involving a critical witness in a civil proceeding would probably be considered gross negligence.

Compare this to the necessity of having counsel present at a psychiatric examination had during a criminal trial where the one crucial issue is the defendant's sanity. 34/

It thus becomes evident that defendants' counsel does not have an adequate opportunity to impeach the testimony of an expert witness when he has no idea, or reliable source from which to determine whether or not the defendant provided the psychiatrist with the necessary facts upon which to base a conclusion. For example, what if the defendant was feeble-minded, catatonic, or otherwise stood mute during the examination. The defense counsel cannot accurately determine, nor can any appellate court ever review, what transpired "behind the closed doors" at defendants' oral examination. 35/

34/ The accused has no control whatsoever regarding the conduct of the psychiatric examination.

35/ It is difficult to see how any proceedings could have been more critical to petitioner than the compelled psychiatric examination.

This Court expressly held in Wade:

> ". . . the principal of Powell v. Alabama and succeeding cases requires that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." (388 U.S. at 227) (Emphasis by the Court "any".)

What this Petition seeks is to have this Court now hold that a defendant whose sanity is in question, be afforded the guiding hand of counsel in the very proceeding upon which hinges his guilt or innocence. 36/

2. APPROPRIATE SIXTH AMENDMENT SAFEGUARDS HAVE BEEN SUGGESTED IN VARIOUS FEDERAL AND STATE CASES.

The United States Court of Appeals for the Ninth Circuit, in Schantz, v. Eyman, (9th Cir. 418 F 2d 11, (1969) Cert. denied 397 U.S.1021 (1970) was faced with a situation involving the post indictment questioning by a state psychiatrist, on instructions of the prosecutor, without notice to, and in the absence of, counsel. The procedure violated Petitioner's right to the assistance of counsel at a critical stage of the proceedings against him. Said the Court of Appeals, in Schantz, v. Eyman, Supra, at 13:

> "The precise question, therefore, is whether potential substantial prejudice inhered in petitioner's post indictment pretrial confrontation with the state's psychiatrist, and whether counsel's presence would have helped avoid the prejudice."

36/ If the psychiatric examination is improperly conducted, the defendant isthus deprived of the opportunity of ever proving his innocence.

The Court of Appeals, rejecting the argument that the presence of counsel could not have avoided prejudice because counsel could have done no more than advise Petitioner to refuse to submit to the examination (the same course which Petitioner chose in the absence of counsel). The opinion went on to point out that counsel could have done much more. Counsel could have told Petitioner that his refusal to be examined might be admitted in evidence against him and could have advised him whether, in light of this fact, it would have been better to agree to the examination, the court continued, 418 F 2d 11 at 14:

> "If this course had been adopted, counsel might have afforded Petitioner further protection by insisting that the examination be conducted under appropriate safeguards, such as the use of neutral experts, the presence of a defense representative, and the preparation of a taped or stenographic record of the examination." 37/

The Supreme Court of Arizona has held that the courts of that State lack statutory or inherent power to compel a defendant to submit to a pre-trial mental examination. 38/

The record here is devoid of any testimony or evidence which would even remotely suggest that the examination by the court appointed psychiatrists would have been reduced in effectiveness, or have been otherwise impaired, by the presence of defense counsel or a stenographer. The presence of such reasons on the record appears to have been essential to a determination of the question by the Supreme Court of New Jersey in State v. Whitlow, 210 A 2d 763 (1965). Said the Supreme Court of New Jersey, at 776:

37/ The trial court in this pending petition, precluded the petitioner from having either Counsel or a stenographic reporter present.

38/ See Steward v. Superior Court, 94 Ariz. 279 388 P 2d 191, (1963) decided upon other than Sixth Amendment grounds.

> "If, upon application by the state for leave to examine, defense counsel requests permission to be present at the examination, the court should require some showing by the prosecutor as to the attitude of the psychiatrists about the presence of counsel. Of course, if there is no objection, permission should be granted. (In such case, counsel should realize his attendance is in the capacity of an observer, not an active participant.) If, in their view the presence of such a nonprofessional would hinder or operate to reduce the effectiveness of their examination, or if they assert they cannot examine in his presence, the court may in the exercise of its discretion exclude counsel from the examination. In this event, if defendant requests, consideration may be given to the feasibility of permitting such devices as recording instruments or the like to be utilized at the psychiatric interview. In any case the court should allow a defense psychiatrist to attend the examination, if such a demand is made."

As we have pointed out, the record here is silent with respect to the feelings of the court appointed psychiatrists as to the presence of defense counsel, a stenographer, or a defense psychiatrist.

It is suggested, however, that in any event, the overriding weight of Sixth Amendment guarantees afforded a defendant tips the scales unmistakenly in favor of the presence of defense counsel at a court appointed psychiatric examination. That counsel's presence might somehow impede the effectiveness of the psychiatric examination, must be balanced against the Sixth Amendment guarantee of the presence of counsel at proceedings where the results might well determine the fate of a defendant. We believe

that this court has spoken quite clearly as to the direction in which the scales must tip in such situations. In U.S. v. Wade, 338 U.S. 218, 237-238, this Court held:

> "And to refuse to recognize the right to counsel for fear that counsel will obstruct the course of justice is contrary to the basic assumptions upon which this Court has operated in Sixth Amendment cases. We rejected similar logic in Miranda v. Arizona concerning presence of counsel during custodial interrogation, 384 U.S., at 480-481:
>
> '(A)n attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath-to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution.'
>
> In our view counsel can hardly impede legitimate law enforcement; on the contrary, for the reasons expressed, law enforcement may be assisted by preventing the infiltration of taint in the prosecution's identification evidence."

In United States v. Driscoll, 399 F 2d 135 (1968), the Court of Appeals for the Second Circuit, while not passing upon the appellant's contention that under United States v. Wade, supra, he was constitutionally entitled to have his lawyer present during a psychiatric examination, nevertheless reversed a judgment of conviction holding that counsel could have ensured certain procedural safeguards, under appropriate conditions, such, as, if feasible, having the appellant's own representative present at, or requiring a transcript or videotape of the examination (399 F 2d 138).

The California Supreme Court has also had occasion to comment upon the issue. In People v. Morse, 70 C 2d 711; 76 Cal Rptr. 391, that court commented:

> "Recognizing the importance of accurate psychiatric evaluation in cases involving the mental condition or state of mind of the accused, we have thus endeavored to preserve the effectiveness of psychiatric examination within the framework of constitutional guarantees to the assistance of counsel at all stages of the proceedings." (Emphasis added) 39/

39/ California, unlike the Federal Courts, has formulated an enlightened procedure with respect to the trial of criminal matters in which the question of a defendants sanity is put into issue. By virtue of Section 1026 of the California Penal Code, California provides for a bifurcated trial. Most of the objections to a defendant's cooperating with a prosecution or court appointed psychiatrist are thereby eliminated since, under this procedure, the defendant's statements with respect to the issue of guilt may be introduced only at the sanity phase of the trial and the psychiatrist may not testify, nor may any evidence of the defendant's statements to the psychiatrist, be put before the jury at the guilt phase of the proceedings. It is suggested, at a later point in this petition, that this Court should, under its supervisory authority over the proceedings in the Federal Courts, adopt a similar procedure so that both a defendant and his counsel might be more freely inclined to cooperate with court appointed psychiatrists, rather than,as here, be placed between the Scylla of being forced to cooperate with the Court appointed psychiatrist under penalty of being precluded from introducing any expert testimony of insanity and the Charibides of having the psychiatrist testify from statements made by the defendant during the course of such examination.

Indeed the young and the mentally infirm require as much, if not a greater degree, of assistance than those who are merely criminally suspect. This Court quite recently had occasion to point out in Re Gault, 387 U.S. 1, 28 (1967), that:

> "Under our Constitution, the condition of being a boy does not justify a Kangaroo Court."

This Court should grant certiorari here to similarly hold that the condition of being insane does not justify a psychiatric examination from which are precluded the defendant's counsel, or any record of the proceedings.

If a criminal suspect is to be deemed incapable of properly protecting himself at a police station or a lineup, a defendant who is suspected of being insane could hardly be expected to protect himself at a psychiatric examination without the "guiding hand of counsel" being present to ensure the essential fairness of the proceedings. 40/

40/ While it could possibly be said that the psychiatric examination is not an in-court proceeding as to thus require the stenographic reporting of the psychiatric examination and the presence of counsel for the purposes of insuring an accurate record, it is quite apparent that any trier of fact relies most heavily upon the opinion of the examining psychiatrist in determining the question of sanity. Indeed, a long series of cases (McKenzie v. United States, 266 F 2d 524 (10 Cir. 1959); United States v. Westerhausen 283 F 2d 844 (7th Cir. 1960); Argent v. United States 325 F 2d 162 (5th Cir. 1963); Isaac v. United States, 284 F 2d p.168 (D.C. Cir. 1960) and Buatte v. United States 330 F 2d 342 (9th Cir. 1964) reversed judgments of conviction where the Government sought to rely upon the testimony of lay witnesses to overcome substantial evidence of insanity on the part of professionals. The crucial importance of the psychiatric examination is thus self-evident.

3. The WADE-THORNTON Rationale to The Right To Have The Assistance Of Counsel In Similar Civil Proceedings Is Well Established.

The right of a party to a civil action to have the assistance of counsel and a court reporter present during a physical examination was recognized sometime ago by the California Supreme Court. In Sharff v. Superior Court, 44 Cal 2d 508 (1955), Chief Justice Gibson, speaking for a unanimous Court, held that whenever a doctor selected by the defendant conducts a physical examination of the plaintiff,

> "There is a possibility that improper questions may be asked, and a lay person should not be expected to evaluate the propriety of every question at his peril. The plaintiff, therefore, should be permitted to have the assistance and protection of an attorney during the examination."

The California Supreme Court rejected the argument that objections by counsel might hinder the examination, stating that the client should not be left unprotected on the assumption that the attorney might interfere and that should any such interference occur, appropriate steps could be taken by the Court.

The United States Court of Appeals for the District of Columbia circuit, in Thornton v. Corcoran, 407 F 2d 695 (D.C. Cir. 1969), similarly rejected the government's argument that the presence of defense counsel during a psychiatric staff conference might prove a disruptive influence or impair the eficacy of the examination. Noting this Court's observation in United States v. Wade, 388 U.S. 237-238, that:

> "To refuse to recognize the right to counsel for fear that counsel will obstruct the course of justice is contrary to the basic assumptions upon which this court has operated in Sixth Amendment cases."

The Court of Appeals, thus, was of the opinion that:

> "the argument that a lawyer will prove a fatally disruptive influence at such a hearing is not compelling." (407 F 2d 701)

The Court of Appeals thereupon opined (407 F 2d 695, 702):

> "The Petitioner's claim that the logic of Wade v. United States should apply to his staff conference at St. Elizabeth's Hospital is therefore anything but frivolous."

In Gonzi v. Superior Court, 51 C 2d 586 (1959), the California Supreme Court, again speaking unanimously, recognized the right of either party to a personal injury action to have a reporter present during a physical examination, holding:

> "If an injured plaintiff is not permitted to have a reporter present at the court-ordered examination by defendant's doctors there is no disinterested person present to report, or later testify to, what occured during the examination. If the defense-employed doctor is called upon to testify at the trial on the issue of plaintiff's injuries his version of the questions and answers elicited at the examination might differ materially from plaintiff's counsel's version of the same questions and answers. It appears to us that orderly procedure in the administration of justice requires that permission be granted at the request of either party for a reporter's presence in such a situation as is here presented."

If there is a cognizable right to the protection and assistance of counsel during a medical examination of a litigant in a civil proceeding which seeks merely the recovery of

money damages, the argument that a defendant in a criminal case, where life or liberty are at stake, who is suspected of being insane should be entitled to the protection and guidance of counsel during a medical examination, becomes an even more compelling one.

4. It Need Not be Speculated Upon As To Whether Prejudice Resulted From The Exclusion Of Petitioner's Counsel From The Psychiatric Examination

Assuming, arguendo, as we have contended here, that the Court ordered psychiatric examination of Petitioner was a critical stage of the proceedings, it becomes unnecessary to speculate as to the various services that Petitioner's counsel might have performed had he been permitted to be present at the Court ordered psychiatric examination of Petitioner. 41/ 42/

41/ Counsel's presence, however, might well have discouraged the prosecutor from subsequently communicating with Dr. Deering following the first examination. As we have previously pointed out, the prosecutor here not only delivered certain documents to the doctor, but on at least two occasions held discussions with him. We do not deem it pertinent to comment at length upon the questions raised by the prosecutor's conversations with Dr. Deering. Suffice it to say, that any such communication with a trial juror would surely have resulted in the imposition of sanctions. (The relationship of Dr. Deering to the prosecutor was no different than that of a prosecutor and a juror. Dr. Deering, like a trial juror, was in effect ordered by the Court to reach a conclusion as to an issue in the case.)

42/ It should also be remembered that the Court's Orders, while prohibiting the presence of defense counsel, did not similarly prohibit the presence of the prosecutor.

As this Court had occasion to point out long ago, in Glasser v. United States, (1942), 315 U.S. 60, 76:

> ". . . The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.

That indeed was the whole point of Gideon.

In dealing with the denial of counsel in pretrial proceedings, this Court, in Hamilton v. Alabama, 368 U.S. 52,55 (1961) speaking unanimously through Mr. Justice Douglas, opined:

". . . We do not stop to determine whether prejudice resulted."

In numerous other instances, this Court has evidenced its views that reversals of judgments of conviction would ensue as the result of a denial of fundamentally protected rights without the necessity of any showing of prejudice. 43/

43/ For examples of this Rule, see Tumey v. Ohio, 273 U.S. 510 (1926) (Judges financial interest in result even though defendant clearly guilty); Lynumn v. Illinois, 372 U.S. 528 (1963) (holding harmless error argument to be an "impermissible doctrine" where confesseion erroneously admitted); Haynes v. Washington, 373 U.S. 503, 518, 519 (1963) (reversal for improperly admitted confession even though it was unnecessary to the conviction); Sheppard v. Maxwell, 384, U.S. 333, (1966) (reversal where defendant exposed to adverse pretrial publicity, no showing necessary that jurors were prejudiced); Bollenback v. United States, 326 U.S. 607 (1944) (instruction on unconstitutional presumption even though ample other evidence to sustain the conviction); Whitus v. Georgia, 385 U.S. 545 (1967) (discrimination in selection of Grand or Petit jurors); Stromberg v. California, 283 U.S. 359 (1930) and Williams v. No. Carolina, 317 U.S 287 (1943) (reversal of conviction based on unconstitutionally impermissible grounds, although conviction could have been sustained on valid alternative ground).

CONCLUSION

The conclusion thus appears inescapable that the trial court's Orders precluding Petitioner's counsel from being present at the court ordered psychiatric examinations affected the fundamental fairness of the proceedings and requires a reversal from a denial of counsel.

In holding that the defendant has the right to assistance of counsel at the post-indictment lineup, this Court, in United States v. Wade, supra, pointed to the critical nature of the confrontation between the accused and the victim or witnesses and the possible dangers to the accused. Dangers such as the domination of the accused by a highly trained psychiatrist or the suggestion by the psychiatrist that the accused is guilty of a crime by virtue of the charge against him are equally present in the confrontation between the accused and the psychiatrist.

As has been stated in a recent article discussing the presence of counsel and a stenographic record at psychiatric examination:

> "Without the aid of a mentally sound client, without the aid of a stenographic record, and without actual presence at the examination, defense counsel, at best, could merely speculate as to what actually occurred. Arguably, when a defendant is taken behind closed doors with a Government's expert mine-prober, the Sixth Amendment and the due process clause entitle the defendant to a minimal degree of protection at least in the form of counsel and a permanent stenographic record of the examination." 1970 Journal of Taxation 322, 326

II. PETITIONER WAS UNCONSTITUTIONALLY DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL AND HIS FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION.

A. A Defendant's Sixth and Fifth Amendment Rights Are Violated Where the Trial Court's Order Compels the Defendant to Submit to An Oral Psychiatric Examination By A Psychiatrist Because It Does Violence to Due Process and Fundamental Fairness.

Mr. Justice Berger, in THORNTON, supra, at 705, while sitting as a Circuit Judge for the United States Court of Appeals for the District of Columbia commented:

> "Moreover, I see no theoretical or practical justification apart from the Fifth Amendment for permitting counsel to attend these pretrial encounters." (Emphasis added)

Petitioner agrees with Chief Justice Berger that a Sixth Amendment violation becomes less theoretical and more practical when coupled with a compelled violation of the defendants Fifth Amendment privilege.

Thus, we proceed here to discuss the case at bar under the proposition that the two rights are of equivalent Constitutional Stature and enjoy equal procedural protection and may even unite into a whole under particular circumstances. Boyd v. United States, 116 U.S. 616. Here, as in Thornton, at 699:

> ". . . The Sixth Amendment claim cannot be resolved without reference to the privilege against self-incrimination. The Supreme Court disposed of that issue in Wade on the ground that no 'evidence of a testimonial or communicative nature' was extracted by a lineup. 388 U.S. at 221-223, 87 S. Ct. at 1929; see also Schmerber v. California, 384 U.S. 757, 86 S Ct.

> "1826 (1966). This argument can hardly do service in the context of a psychiatric examination, however, where the words of the accused are critically important in determining his mental condition." (at 700)

In addition, in the case at bar, it must be remembered that the psychiatric examinations in question were requested by the prosecution and the Court compelled the defendant to choose between his Constitutional Rights under the Sixth and Fifth Amendments or be precluded from exercising his equally Constitutional right of presenting a meritorious defense on the issue of his sanity.

In Wade v. United States, 426 F 2d 64, 74 (9th Cir. 1970) (en banc),

> "Finally, it must be noted that Wade has presented in addition to the insanity issue, a question of great importance that has not as yet been satisfactorily answered in this or any other Circuit. This question is whether a trial court, when appointing a psychiatrist to examine the defendant pursuant to 18 U.S.C. Section 4244 or pursuant to its inherent powers, may properly order that the examination cover both competency to stand trial and criminal responsibility at the time of the alleged offense. More importantly, assuming that this order is valid the question is raised whether a court has the inherent power to order, as the District Court here did, that the defendant must cooperate and provide information to the court-appointed psychiatrist, or else be 'precluded at the time of trial from offering any evidence upon the defense of insanity'."
>
> "This type of order requires the defendant to supply the court-appointed psychiatrist with information on the basis of which, in part, the psychiatrist can form an opinion of

> "the defendant's mental state at the time of the offense. If the psychiatrist is subsequently permitted to testify for the prosecution during trial, the result may be that the defendant's own words are used against him. Therefore, coerced cooperation with a psychiatrist not chosen by the accused may violate the Fifth Amendment privilege unless it can be justified on one or more of various theories that have been discussed by both courts and commentators. . ."
>
> "It is quite obvious that a grave constitutional question is presented."

In the case at bar, it is clear that, over his objection, petitioner was compelled to "afford such cooperation and information as may be required by" court-appointed psychiatrists outside the "presence of any counsel . . . designated by defendant." (Order Appointing Psychiatrists Exhibit C, Supra) 44/

In the words of the lower court (Ibid.):

> "If the defendant does not comply with this order he shall be precluded at trial from presenting testimony upon the issue of his alleged mental incapacity by any expert by whom he has been interviewed."

Accordingly, the compulsion on petitioner to relinquish his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel in order to assert his insanity defense is clear.

The only question is whether such surrender is constitutional.

44/ Dr. Deering was called by and testified on behalf of the prosecution herein.

In Sherbert v. Verner, 374 U.S. 398, 404-406 (1963), the Supreme Court held that the exercise of privileges and rights cannot be governed by conditions or qualifications which erode or emasculate constitutional rights.

Handy's exercise of his insanity defense was conditioned upon an unrestricted examination by two court appointed psychiatrists, which examination violated his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel. Here, as in Sherbert to condition Handy's insanity defense upon his willingness to surrender his Sixth and Fifth Amendment rights effectively penalized the exercise of his Constitutional rights. See also Thorpe v. Housing Authority, 386 U.S. 670, 679 (1967):

> "The right to continue the exercise of a privilege granted by the State cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the Federal Constitution. . . If the State may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

In sum, the trial court compelled Handy to surrender his right to counsel and his right against self-incrimination in order to raise his insanity defense. In Gardner v. Broderick, 392 U.S. 273 (1968), this Court held that a New York City Charter provision, under which a policeman had been dismissed for failing to waive his right against self-incrimination and to sign a waiver of immunity from prosecution, was unconstitutional. Here, as in Gardner, the "mandate of the great privilege against self-incrimination" cannot tolerate its surrender since it is clear that Handy's examination by two court appointed psychiatrists was unrestricted and compelled solely to establish, as an element of

his alleged offense, his legal sanity beyond a reasonable doubt. See also: Uniformed Sanitation Men Assn. v. Commissioner of Sanitation, 392 U.S. 280 (1968); Spevack v. Klein, 385 U.S. 511 (1967); and Garrity v. New Jersey, 385 U.S. 493 (1967).

This Court in Wade held:

> "Of course, nothing decided or said in the opinions in the cited cases links the right of counsel only to protection of Fifth Amendment rights. Rather those decisions 'no more than reflect a constitutional principle established as long ago as Powell v. Alabama.' . . ."

However, in the case at bar the Petitioner's Sixth Amendment rights are closely linked to his Fifth Amendment privilege.

For this reason alone, Handy's conviction must be reversed.

III. The Trial Court's Order, Over Defendant's Objection, Compelling Defendant to Answer Questions Of and To Fully Cooperate With Court Appointed Psychiatrist Or To Forfeit His Right To Present Expert Testimony On the Issue Of His Insanity Is Unconstitutional Under the Self-Incrimination Clause of the Fifth Amendment Because It Extracts (Exacts) a Price For Exercising His Constitutional Right Against Self-Incrimination.

In discussing the compelled self-incrimination issue at bar, petitioner will try to show that in its application in reason here, it is utterly incompatible with the historic dimensions of the Fifth Amendment privilege, as construed and applied by this Court; and that to compel a sanity defendant to testify involuntarily contravenes the plain command of that Amendment.

A. Compulsory Self-Incrimination As A Condition to Presenting Expert Testimony Is Incompatible With Decisions Of This Court Condemning Such Process As Violative Of The Fifth Amendment.

This Court has repeatedly noted that one of the principal policies underlying the privilege is "the inviolability of the human personality" and that:

> "Our accusatory system of criminal justice demands that the Government seeking to punish an individual produce the evidence against him by its own independent labors rather than by the cruel, simple expedient of compelling it from his own mouth."
>
> Miranda v. Arizona, 384 U.S. 436, at p. 460 (1966)

While the trial court's order here did not

technically purport to compel "communications" or "testimony", it is evident that any order directing a defendant to submit to an unrestricted psychiatric examination, by its very essence compels communications and testimony.45/ It seems certain that no competent psychiatrist would profess to conduct any examination of a defendant for the purpose of determining his insanity at the time of the commission of an alleged crime without eliciting verbal responses from the defendant. The situation here thus differs from Schmerber v. California, 384 U.S. 757 (1966), and Gilbert v. California, 388 U.S. 263 (1967).

Those cases involve "non-verbal" acts or conduct and there was clearly no communication or testimony involved. Indeed, this Court, in Gilbert v. California, supra, while holding that the taking of handwriting exemplars did not violate the petitioner's Fifth Amendment privilege against self-incrimination, pointed out that (388 U.S. 263,266):

> "The privilege reaches only compulsion of 'an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpena to produce one's papers' and not 'compulsion which makes a suspect or accused the source of "real or physical evidence" . . .' " (Emphasis added)

Thus, while the voice identification of a defendant is an identifying physical characteristic outside of the Fifth Amendment protection (Wade, Supra), the communications which petitioner herein was effectively compelled to engage in with the examining psychiatrists were not for the purpose of identifying physical characteristics but, by the very essence of the communications, appellant was effectively compelled to

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45/ As we have pointed out elsewhere the defendant could have refused to comply with the order, or stood mute at the examination at the price of foregoing his insanity defense.

discuss not only the circumstances of his life, but the circumstances surrounding the commission of the alleged crimes.

We believe that the issue involved herein was alluded to in Schmerber v. California, 384 U.S. 757, where this Court pointed out (384 U.S. 757 at 764-765):

> "Some tests seemingly directed to obtain 'physical evidence' for example, lie detector tests, measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege 'is as broad as the mischief against which it seeks to guard,' Counselman v.Hitchcock, 142 U.S. 547 at 562."

To compel petitioner herein to submit to psychiatric evaluations, of necessity, required testimonial compulsion. As this Court continued in Schmerber, which held that blood tests did not constitute testimonial compulsion within the meaning of the Fifth Amendment (384 U.S. 757,765):

> "Petitioner's testimonial capacities were in no way implicated; indeed, his participation except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone."

While the donor's testimony is irrelevant to the results of the test which depend upon chemical analysis alone, the participation of the patient in a psychiatric interview is the very thing that is relevant to the results which depend not upon any scientific or objective test but solely upon the conclusions drawn by the

psychiatrist from the verbal and testimonial communications of the defendant.

The situation here far more closely resembles that of a defendant being compelled to submit to a lie detector test which the Supreme Court has, in Schmerber v. California, supra, pointed out would be violative of his Fifth Amendment rights since the test was an effort to determine his guilt or innocence on the basis of physiological and verbal responses. A test in which an effort is made to determine the guilt or innocence of a defendant based, as here, on his own verbal communicative responses certainly must evoke the spirit and history of the Fifth Amendment.

In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." Malloy v. Hogan, 378 U.S. 1, 8 (1964)

1. The Letter and Spirit of the Fifth Amendment Denied The Lower Court the Power To Compel Testimony Over Objection Of the Privilege Against Self-Incrimination.

The right against self-incrimination is one of the most ancient and respected rights granted in the United States Constitution. (see Miranda v. Arizona, 384 U.S. 436, 442-444 (1966); Gardner v. Broderick, 392 U.S. 273 (1968); Uniformed Sanitation Men Association v. Commissioner, 392 U.S. 280 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967); and Spevack v. Klein, 385 U.S. 511 (1967). The Court's reasoning in the Garrity and Spevack cases is summarized as follows:

> ". . . the Self-Incrimination Clause of the Fifth Amendment. . . should not be watered down by imposing. . . a price for asserting it." Spevack v. Klein, 385 U.S. 511, 514 (1967).

Application of such reasoning to the instant case demands a holding that a court cannot

force an accused to choose between the defense of insanity and his constitutional right against self-incrimination. To hold otherwise would be to force a defendant to choose between an important and vital defense and the exercise of his free choise "to remain silent."

The Ninth Circuit has recognized that the issue obviously presents "a grave constitutional question." Wade v. United States, supra, at 74.

State courts have not been reluctant to apply the foregoing principle to closely similar situations.46/ Legal commentators have also recognized the logic and wisdom of this rationale.47/

46/ See Shepard v. Bowe, 442 P 2d 238 (Ore. 1968) (holding that a defendant could not be compelled to answer at a pretrial mental examination, a psychiatrist's questions concerning his conduct relating to the offense charged); State v. Olson, 274 Minn. 225, 143 N.W. 2d 69 (1966), (defendant may not be compelled to a psychiatric examination where unprotected against self-incrimination); People v. English, 31 Ill. 2d 301, 201 N.E. 2d 445(1964) (invocation of Fifth Amendment privilege at psychiatric examination upheld); People v. Wax, 75 Ill. App. 2d 163, 177-179, 220 N.E. 2d 600, 607-608 (1966). cert.denied 387 U.S. 930, 87 S Ct 2051 (1967), (right of defendant to remain mute during examination of court appointed psychiatrist upheld, even though defense of insanity raised at trial); French v. District Court, 153 Colo.10 14, 384 P 2d 268, 270 (1963), (holding trial court's order striking defendant's plea of not guilty by reason of insanity because of refusal to cooperate with court appointed psychiatrist improper as imposing a penalty or forfeiture for the exercise of Fifth Amendment rights).

47/ See Canforth, Death Knell for Pre-Trial Examination? Privilege Against Self-Incrimination, 19 Rutgers L.Rev. 489 (1965), ("if we are to remain true to the accusatorial system with the privilege against self-incrimination at its core, it seems necessary that a defendant who has raised the defense of insanity at the time of the alleged crime cannot be compelled to respond to the question of a court-appointed psychiatrist." See 19 Rutgers L.Rev. at 505); See also an article entitled Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination, at 83 Harv. L.Rev.

IV. This Court Should Grant Certiorari To Settle Conflicts, Confusion and Uncertainty Among the Circuit Courts Of Appeal With Respect To The Guide-Lines Required To Be Established By The Trial Court Governing the Examination Of A Defendant By a Psychiatrist Appointed By the Court At The Request Of The Government.

This petition presents the opportunity for Constitutional interpretation that goes far beyond the geographical limits of the Ninth Circuit Court of Appeals, and indeed beyond the interests of the petitioner herein in that the principal issue here is one of recurring significance.

Not only is the decision of the Ninth Circuit Court of Appeals clearly wrong, it is a grave example of the depravation of due process and the defendant's fundamental right to a fair trial. Not only is the Ninth Circuit's opinion herein worthy of review, but the paramount issue is, likewise, of compelling national significance in view of the confusion and uncertainty among the various Circuit Courts of Appeal with respect to the necessary guidelines that are required to be established in order to conduct examinations by court appointed psychiatrists within the spirit and letter of the Constitutional dictates of the Sixth Amendment to the Constitution, while at the same time not offending the mandate of the right against self-incrimination under the Fifth Amendment to the United States Constitution.

Cont.

47/ 648 (sets forth the values that this court has described as being protected by the privilege against self-incrimination. 83 Harv. L. Rev. 655-656. After analyzing the effect of a compulsory psychiatric examination on these values, the note continues: "since the psychiatric examination elicits information akin to testimonial evidence and since the examination conflicts with values protected by the privilege, it should be found to be the kind of information gathering in which participation cannot be required by the state. 83 Harv. L. Rev. at 660."

The Second, Fourth, Seventh, Eighth, Ninth, and D.C. Circuits have struggled to provide the Government, in a sense of fair play, with the prosecution's right (under appropriate rules) to compel psychiatric examinations of defendants by court-appointed physicians. In so doing, great confusion and uncertainty has arisen, as a result of the inherent conflict, with the Fifth and Sixth Amendments arising out of the insanity issue in Federal criminal trials. Unlike the specific plea in most state courts of "Not Guilty by Reason of Insanity" the Federal system provides that once the sanity of the defendant comes into issue the Government must establish defendant's sanity as an element of the crime, beyond a reasonable doubt. 48/

Naturally, to do so requires an appropriate psychiatric interview where the defendant, of necessity, must offer "oral testimony" on the issue in order that the Government's expert may make an appropriate determination. To do so, without permitting the presence of the "alleged" incompetent's attorney indeed shocks not only the conscience of the Federal system of trial, but clearly violates the mandate of the Sixth Amendment even if the trial court is scrupulously careful to avoid the contamination of "confession" and/or guard against the admission of any such evidence at the time of trial.

Thus counsel, or at least the right to counsel, has become the sine qua non of fairness at every stage of a felony proceeding in order to protect the integrity of the fact finding process of trial.

No constitutional theory justifies limiting that protection.

48/ Trial courts should be required to grant a bifurcated trial where a defendant's sanity is drawn into issue when court compels defendant to choose between an unrestricted oral psychiatric examination by court appointed psychiatrists, not restricted to defendant's sanity, or forego presentation of expert testimony upon the issue of his mental incompacity by any expert by whom he has been examined.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

ROBERT M. TALCOTT and
RICHARD G. SHERMAN,
Attorneys for C. Jon Handy,
Petitioner.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

C. JON HANDY,
Defendant-Appellant.

No. 71-1924

[October 20, 1971]

Appeal from the United States District Court
for the Central District of California

Before: CHAMBERS, Chief Judge, WEICK* and CARTER, Circuit Judges.

WEICK, Circuit Judge:

In Counts 1 and 2 of a 5-count indictment returned by the Grand Jury, Handy, as manager of Palm Springs Panorama, Inc. ("P.S.P."), was charged with filing false and fraudulent income tax returns and wilfully attempting to evade income taxes owed by said corporation for the calendar years 1964 and 1965, in the respective amounts of approximately $350,020 and $241,030, in violation of 26 U.S.C. § 7201. In Counts 3 and 4 Handy was charged with wilfully aiding, assisting, counseling and procuring the preparation and presentation of fraudulent income tax returns for P.S.P. for said calendar years, in violation of 26 U.S.C. § 7206(2). In Count 5 he was charged with wilfully attempting to evade taxes of about $6,000 in behalf of himself and his wife, in violation of 26 U.S.C. § 7201. In a separate one-count indictment he was charged with submitting to an Internal Revenue Agent a

*Honorable Paul C. Weick, Circuit Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

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false document purporting to be a Management Fee Agreement, in violation of 18 U.S.C. § 1001.

At the conclusion of a 15-day trial, Handy was found guilty by a jury on counts 1, 2, 3 and 4 of the indictment, and acquitted on count 5. He was found guilty also on the separate indictment charging him with submitting a false document to an Internal Revenue Agent. He was sentenced under the provisions of 18 U.S.C. § 4208(c) to five years' imprisonment on each of the counts on which he was found guilty, the sentences to run concurrently. He was released on a $10,000-bail bond pending appeal.

The charges on which Handy was convicted stemmed from alleged phony deductions taken in the income tax returns of P.S.P. in the amount of $709,963, labeled "Management Services and Consultant fee" in the year 1964, and $900,000 in the year 1965 for forfeited deposit on an alleged purchase of land.

There was substantial evidence that the sum of $709,963 was not paid by P.S.P. to Handy in the year 1964, or at any other time; that the alleged written contract providing for payment of said sum was spurious; and further, that the forfeited deposit which was deducted was fictitious. The alleged fictitious loss was not entered on the corporate books until after the return had been filed.

The profits of P.S.P. for ten months in 1964 amounted to $762,000. It had made provision for federal taxes amounting to $374,000. The deduction of $709,963, if valid, would have wiped out most of the profits for that year and would have eliminated most of the income tax.

Handy had entered into a written agreement with Messrs. Kagan, Manchel and Silverman (the owners of all of the shares of stock of P.S.P.) on December 14, 1964, to purchase their shares of stock for $4,000,000. He negotiated a corporate loan for P.S.P. from Transamerica Financial Corporation, the proceeds of which were used to pay for said stock.

There was evidence that the shareholders who sold their shares to Handy refused to allow him any compensation for so-called management and consulting services. In the written contract for

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the purchase of said shares Handy waived any claim for such services against either P.S.P. or said shareholders.

In appellant's brief it is stated:

> "During the trial witnesses for the prosecution testified that the management fee agreement and forfeited deposit documents were false whereas witnesses for the defense testified that they were true."

In our judgment, the overwhelming evidence supports the Government's contentions with respect to these two deductions. Appellant's briefs are addressed to other issues which we will consider.

I

The Insanity Defense

The principal defense of Handy was that he was insane at the time the alleged criminal acts were committed. This, of course, is not the usual defense in income tax evasion cases.

There was substantial evidence that during the period of time in question Handy was able to and did engage in extensive negotiations in important and complex business transactions. At one time he operated an income tax service in Las Vegas, Nevada. He held himself out as being an expert in income tax matters, particularly in the area of tax deductions. He set up an elaborate scheme to avoid taxes in the present case. To people with whom he dealt he did not appear to be insane.

Handy relies on the testimony of four psychiatrists and one psychologist to substantiate his claim of insanity. One of the psychiatrists who testified for the defense was court-appointed. They examined Handy in 1970, about five years after the critical dates of 1964 and 1965.[1] They testified in substance that Handy had paranoid schizophrenia; that he lacked capacity to appreciate the wrongfulness of his conduct; that he was not in control of his actions; and that he could not have criminal intent to defraud the Government.

[1]One psychiatrist, Dr. McKeever, had previously examined Handy in 1952, while he was in the Air Force, in connection with Handy's application for a discharge. Dr. McKeever at that time thought Handy was feigning mental illness in order to obtain a discharge from service.

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Dr. Wilkens, who testified for Handy, admitted that where a person is acting rationally in his business areas, that fact would suggest that his disorder was minimized at that time. To the same effect was some of the testimony of Dr. Suarez. Also, Handy was able to advise one of the psychiatrists who examined him as to the Ninth Circuit's rule in insanity cases.

Dr. Deering, a court-appointed psychiatrist who testified for the Government, was of the opinion that in 1964-1966 Handy did not lack substantial capacity to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of the law, and that he was legally sane. He admitted that Handy had neurosis and that his case was difficult to diagnose.

In addition, the testimony of three lay persons was put in evidence by stipulation.

Handy contends that the evidence supporting his claim of insanity is overwhelming and that the District Court erred in denying his motion for judgment of acquittal. We disagree.

Handy's evidence was sufficient to overcome the presumption of sanity, and the burden of proof was then cast upon the Government to prove sanity beyond a reasonable doubt. *Hartford v. United States*, 362 F.2d 63 (9th Cir. 1966). The evidence must be considered in the light most favorable to the Government.

United States v. Nelson, 419 F.2d 1237 (9th Cir. 1969); *Glasser v. United States*, 315 U.S. 60 (1942); *Wendt v. United States*, 394 F.2d 627 (9th Cir. 1968).

While the testimony of lay witnesses, standing alone, cannot rebut the testimony of Handy's psychiatrists and psychologist, *Buatte v. United States*, 330 F.2d 342 (9th Cir. 1964), it is important evidence to be taken into account with other evidence in the case, particularly the testimony of the Government psychiatrist, Dr. Deering, which conflicted with the testimony of defendant's experts.

The fact that the defense had more experts to testify than the plaintiff had, is not of controlling importance. The weight of the evidence is not determined by the number of witnesses who testify for either side, but by the quality of their testimony. The credibility of experts is to be determined by the jury, not by the court.

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In our opinion there was substantial evidence to support the jury's verdict and we will not disturb it.

We find no violation of the accused's Fifth and Sixth Amendment rights in the order of the District Court appointing two psychiatrists to examine him.[2] The order provided:

> "If defendant does not comply with this order he shall be precluded at trial from presenting testimony upon the issue of his alleged mental capacity by any expert by whom he has been interviewed."

This order was materially different from the order which was questioned in *Wade v. United States*, 426 F.2d 64, 74 (9th Cir. 1970).

It would indeed be anomalous if defendant were permitted to offer psychiatric testimony to support his defense of insanity, and by refusing to submit to an examination by a court-appointed psychiatrist preclude the Government from offering testimony to the contrary. The examination ordered by the Court was authorized by statute. 18 U.S.C. § 4244. The statute contains protective features barring the use of any statement made by an accused person on the issue of guilt. Indeed the Court may even have inherent power to make such an order.

The order entered here did not compel "communications" or "testimony". It may be likened to compelling blood tests, handwriting exemplars, "fingerprinting, photographing or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture."[2a] *Schmerber v. California*, 384 U.S. 757 (1966). See also *Gilbert v. California*, 388 U.S. 263 (1967).

Other Circuits have upheld such an order. *United States v. Baird*, 414 F.2d 700 (2d Cir. 1969); *United States v. Bohle*, ___ F.2d ___ (No. 18,604, 7th Cir. 1971); *United States v. Albright*, 388 F.2d 719 (4th Cir. 1968); *Pope v. United States*, 372 F.2d 710 (8th Cir. 1967).

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[2]One of the court-appointed experts testified for the defendant.

[2a]There is no claim here that the court-appointed psychiatrist who examined Handy testified as to any statement made to him by Handy relating to the issue of guilt.

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II

The Allen Charge[3]

The case was submitted to the jury on Friday morning, September 25, 1970. The jury deliberated all day Friday, until 6:00 p.m., and was excused until the following Monday at 9:30 a.m. It deliberated all day Monday, until 5:15 p.m., when it reported to the Court that it was unable to reach a verdict.

The Court conferred with counsel for the Government and for the defendant. The Court stated what transpired at this conference, in denying the motion for a new trial:

> "I think the record in this case indicated . . . the fact that before the court gave the Allen charge [defense counsel] was asked if he had any objection to the charge. He was given a copy of Mathes and Devitt to read. He was also made aware of the fact that the charge had come in for some fire in the Sullivan case. Then when he was asked, after he had an opportunity to read the instruction, if he had any objection to it, his answer was 'No objection.'"

Since neither counsel had any objection, the Court delivered the Allen charge. The jury was excused until 10:00 a.m. the following morning, when it returned its verdict.

The charge which the Court gave was taken substantially from Mathes and Devitt's Federal Jury Practice and Instructions. The charge contained the matters omitted from the instruction criticized by this Court in *Sullivan v. United States*, 414 F.2d 714 (9th Cir. 1969), where the conviction was nevertheless affirmed on the ground that the omissions were immaterial.

The instruction has been consistently approved in the Ninth Circuit when it is in a form not more coercive than that in *Allen. Sullivan v. United States, supra*, and cases therein cited. *United States v. Moore*, 429 F.2d 1305 (9th Cir. 1970).

Counsel relies on an affidavit procured from juror VanOrsdel, who stated in substance that she was coerced by the instruction into agreeing to the verdict; and she further charged that juror Malovich was mentally incompetent. If the affidavit has any

[3]The name of the charge is derived from the case of *Allen v. United States*, 164 U.S. 492, 501 (1896), where the giving of such a charge was held not to be prejudicial error.

truth in it, it is apparent that juror VanOrsdel ignored the instruction of the Court, the substance of which was repeated several times:

> ". . . [Y]ou should not surrender your honest convictions as to the weight or effect of evidence, solely because of the opinion of other jurors, or for the mere purpose of returning a verdict."

A juror may not impeach his verdict where the facts sought to be shown essentially inhere in the verdict. *Bryson v. United States,* 238 F.2d 657 (9th Cir. 1956); *Rakes v. United States,* 169 F.2d 739 (4th Cir. 1948).

In *Rakes, supra,* Associate Justice Prettyman of the Court of Appeals for the District of Columbia, sitting by designation, stated:

> "The same rule requires that jurors are not to be harassed in any manner because of a verdict they have rendered. If jurors are conscious that they will be subjected to interrogation or searching hostile inquiry as to what occurred in the jury room and why, they are almost inescapably influenced to some extent by that anticipated annoyance. The courts will not permit that potential influence to invade the jury room. He who makes studied inquiries of jurors as to what occurred there acts at his peril, lest he be held as acting in obstruction of the administration of justice. Much of such conversation and inquiry may be idle curiosity, and harmless, but a searching or pointed examination of jurors in behalf of a party to a trial is to be emphatically condemned. It is incumbent upon the courts to protect jurors from it." (169 F.2d at 745-746)

Wright, Federal Practice & Procedure, § 554 fn 42.

Appellant relies on decisions from three other Circuits which apparently no longer apply the rule in *Allen.*[4]

We decline, as we did in *Sullivan,* to re-examine the rule in the present appeal.

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[4]*United States v. Thomas,* ..... F.2d ..... (D.C. Cir. 1970), 39 U.S.L. Week 2306, *reaffirmed in banc,* 40 U.S.L.Week 2140 (1971); *United States v. Fioravanti,* 412 F.2d 407 (3d Cir. 1969); *United States v. Brown,* 411 F.2d 930 (7th Cir. 1969).

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Handy was represented in this case by capable and experienced counsel who did not object to the giving of the instruction. Rule 30 Fed.R.Crim.P. provides that no party may assign as error any portion of a charge or an omission to charge unless he objected before the jury retired.

Rule 52(b) permits us to notice plain error; but we do not regard the alleged error as plain. We think it was intelligently waived.

III

Misconduct of the Jury

The affidavit of juror VanOrsdel, filed more than a month after the trial, not only stated that she was coerced by the Allen charge, to return a verdict which she did not want to return, but she also undertook to detail the secret deliberations in the jury room and the conduct and statements of fellow-jurors. She further endeavored to pass upon the sanity of a fellow-juror Evelyn Malovich.

Relative to charges concerning the mental processes of the jurors, the Court ruled that evidence would not be allowed to impeach the verdict. As to any extraneous influences on the jurors, the Court did conduct two post-trial evidentiary hearings. At the first hearing five jurors were examined and cross-examined by counsel for the Government and for the defendant. At the conclusion of the hearing the Court ruled that the charges of misconduct made by juror VanOrsdel concerning her fellow-jurors had not been proven. We agree.

There remains for consideration only the claim of juror Van Orsdel that juror Evelyn Malovich was mentally incompetent. The Court decided to conduct an evidentiary hearing on this subject only after the Court had examined the Juror Qualification Form which juror Malovich had filled out and signed.

Juror Malovich had answered question 7 on the form as follows:

> "7. Do you have any physical or mental infirmity impairing your capacity to serve as a juror
> Yes (Yes or no) If so, describe it fully,
> _____"

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The Court furnished a copy of the form to counsel for defendant. It will be observed that although the first part of Question 7 was answered, the second part was left blank. The jury clerk obviously did not notice the response.

Juror Malovich was called to the witness stand by the Court, who conducted an extensive examination of her. When shown her answer to Question 7 on the juror questionnaire form, she testified: "Your Honor, that is a mistake."

She denied that she had any physical infirmities, or ever suffered from any mental illness; she testified that she had never been examined by any doctor for any possible mental illness. She testified that the correct answer to Question 7 was "No". She also denied statements purportedly made in the jury room, attributed to her by juror VanOrsdel. The Court tested her recollection on a number of matters. The Court further asked her who had the burden of proof, and she replied, "The Government."

The foreman of the jury had previously testified that there was no question in his mind regarding the mental capacity of juror Malovich and that she had capacity to understand the proceedings.

The District Court ruled in part as follows:

> "I am reading [sic] to make my ruling on this issue.
>
> "My ruling is that Juror Malovich is mentally qualified to serve as a juror in this case. She certainly, in my opinion, and based on her testimony, suffers from no physical or mental infirmities. I think she certainly possesses ordinary capacity to observe, listen, understand, discuss the evidence in the case, the arguments of counsel and the court's charge.
>
> . . .
>
> "I am certainly impressed with the fact that we have a woman here who for the past 11 years or 12 years has held down a job as an electronic assembler where she is required to deal with electronic component parts and place them on printed circuits, solder. She has to look at drawings and instructions and follow those. She certainly, it would indicate, has the ability to think and to reason. . . .

APPENDIX "A"

"She appears to the court to have an average understanding of the English language. Certainly I don't remember the exact time we started with her, but certainly the court questioned her for a period of probably a half hour and she understood the court's questions and her answers were intelligent and responsive.

"She appeared to the court to be completed [sic] oriented and knew what she was doing. She indicated that at no time had she ever been treated for or consulted with a doctor about or suffered any mental illness. And her answer to Question 7 on Court's Exhibit A was just a mistake.

"Mrs. VanOrsdel told the court that she through [sic] Juror Malovich had problems with her hearing, but I could detect no such problem. She testified she was able to understand the questions that the lawyers asked and the answers given by the witness. And though there were some occasions when prehaps the testimony wasn't too clear, or the question, but it was cleared up later on for her.

"I might also add that as I commented during our last hearing I detected nothing unusual about her during voir dire or during the period of time that she sat as a juror in this case. She appeared to be attentive, alert. I can recall no time when she was late for jury duty.

"So my conclusion, as I have already stated it, is that she suffers from no mental infirmity and that she appears to this court to be a perfectly normal, ordinary juror. There is not the slightest doubt about that in my mind."

In our opinion there was substantial evidence to support these findings of fact of the District Court, and they are not clearly erroneous. We find no basis for setting aside a jury verdict merely because a juror made a mistake in answering a question on the form, which mistake went unnoticed by the jury clerk. Appellant has shown no prejudice. As found by the Court he was tried by a jury of competent persons.

Furthermore, the challenge to the selection of jurors must be made "before the voir dire examination begins. . . ." 28 U.S.C. § 1867(a), (e). No challenge was made in this case until after the verdict.

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Appellant argues that he should have been granted permission to cross-examine juror Malovich. The Court did permit counsel to submit questions to be propounded to juror Malovich, but he did not propound all questions that were submitted as the Court thought that even some lawyers could not answer all of them.

As we previously pointed out, the Court was quite liberal in permitting examination and cross-examination of five of the jurors. It was discretionary with the Court when to call a halt and avoid further harassment of the jurors. We find no abuse of discretion.

Affirmed.

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APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 22 1972

WM. B. LUCK, CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

C. JOE HANDY,

Defendant-Appellant.

No. 71-1924

O R D E R

Before: CHAMBERS, WEICK and CARTER, Circuit Judges.

The petition for rehearing is denied.

The suggestion for rehearing en banc has been passed to all active circuit judges of the Court and none has requested an en banc hearing. Therefore, the suggestion for rehearing en banc is rejected.

It is ordered that the first sentence in the paragraph which is next to the last paragraph on page 5 of the slip opinion be amended so as to read:

"The order entered here did not compel 'communications' or 'testimony' on the issue of guilt of the defendant."

APPENDIX "B"

SEP 4 1970
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. C. JON HANDY, Defendant.	Nos. 5667 and 37429-HP-CD ORDER APPOINTING PSYCHIATRIST

The Court being advised that the defendant C. JON HANDY intends to assert in this case the defense of mental incapacity at the time of alleged commission of the crimes charged, and that defendant further intends to offer upon this issue the expert testimony of psychiatrists who have interviewed him;

And the United States Attorney having moved the Court for an order appointing a psychiatrist to examine the defendant on the question of his alleged mental incapacity at the time of the alleged crimes;

And the matter having been submitted to the Court upon the plaintiff's and defendant's memoranda of points and authorities, and the Court being fully advised in this matter,

IT IS HEREBY ORDERED that DR. ALVIN E. DAVIS, whom the Court finds is a qualified and impartial psychiatrist, be and he hereby is appointed to examine said defendant and to report to the Court on the question of whether at the time of

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the allegedly criminal conduct defendant as a result of mental disease or defect lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. Attached hereto are copies of the Indictments in this case, which shall serve to inform said doctor of the nature and times of the conduct alleged as criminal in this case.

IT IS FURTHER ORDERED that said defendant be present at the United States Court House, Room 175, 312 North Spring Street, Los Angeles, California, on September 10, 1970 at 12:00 Noon, and at such other times and places as said doctor may deem necessary for the purpose of said examination; and that defendant afford such cooperation and information as may be required by said doctor properly to conduct the mental examination; and that such examination shall not be in the presence of any counsel or stenographer designated by defendan If defendant does not comply with this order he shall be precluded at trial from presenting testimony upon the issue of his alleged mental incapacity by any expert by whom he has been interviewed.

IT IS FURTHER ORDERED that such examination be at the expense of the United States Government.

IT IS FURTHER ORDERED that said doctor shall have delivered to the undersigned Judge of this Court the original and two copies of his report, the Court after examination of said report and in its discretion to furnish identical copies of the whole or part thereof to the United States Attorney and to Richard G. Sherman, the attorney for the defendant.

Dated: September 4, 1970.

Harry Pregerson
United States District Judge

SEP 4 1970
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. C. JON HANDY, Defendant.	Nos. 5667 and 37429-HP-CD ORDER APPOINTING PSYCHIATRIST

The Court being advised that the defendant C. JON HANDY intends to assert in this case the defense of mental incapacity at the time of alleged commission of the crimes charged, and that defendant further intends to offer upon this issue the expert testimony of psychiatrists who have interviewed him;

And the United States Attorney having moved the Court for an order appointing a psychiatrist to examine the defendant on the question of his alleged mental incapacity at the time of the alleged crimes;

And the matter having been submitted to the Court upon the plaintiff's and defendant's memoranda of points and authorities, and the Court being fully advised in this matter,

IT IS HEREBY ORDERED that DR. HAROLD C. DEERING, whom the Court finds is a qualified and impartial psychiatrist, be and he hereby is appointed to examine said defendant and to report to the Court on the question of whether at the time of

APPENDIX "C"

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the allegedly criminal conduct defendant as a result of mental disease or defect lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. Attached hereto are copies of the Indictments in this case, which shall serve to inform said doctor of the nature and times of the conduct alleged as criminal in this case.

IT IS FURTHER ORDERED that said defendant be present at the office of said Dr. Harold C. Deering, at 321 East 2nd Suite 1002 Street, Los Angeles, California, on September 6, 1970 at 9:00 A.M., and at such other times and places as said doctor may deem necessary for the purpose of said examination; and that defendant afford such cooperation and information as may be required by said doctor properly to conduct the mental examination; and that such examination shall not be in the presence of any counsel or stenographer designated by defendant. If defendant does not comply with this order he shall be precluded at trial from presenting testimony upon the issue of his alleged mental incapacity by any expert by whom he has been interviewed.

IT IS FURTHER ORDERED that such examination be at the expense of the United States Government.

IT IS FURTHER ORDERED that said doctor shall have delivered to the undersigned Judge of this Court the original and two copies of his report, the Court after examination of said report and in its discretion to furnish identical copies of the whole or part thereof to the United States Attorney and to Richard G. Sherman, the attorney for the defendant.

Dated: September 4, 1970.

Harry Pregerson
United States District Judge

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1518

C. JON HANDY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, 1-11) is reported at 454 F.2d 885.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1971 (Pet. App. A, 11). A petition

for rehearing and for rehearing *en banc* was denied on March 22, 1972 (Pet. App. B). On April 18, 1972 the time for filing a petition for a writ of certiorari was extended by Mr. Justice Douglas to May 20, 1972, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court erred in requiring petitioner to submit to a psychiatric examination, conducted outside the presence of counsel, as a prerequisite to petitioner's use at trial of expert testimony on the issue of his mental capacity.

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner, the corporate manager of Palm Springs Panorama, Inc. ("P.S.P."), was convicted of submitting a false document to an Internal Revenue agent, in violation of 18 U.S.C. 1001, of willfully preparing false corporation income tax returns, in violation of 26 U.S.C. 7206(2), and of attempting to evade and defeat the corporation taxes of P.S.P. for 1964 and 1965, in violation of 26 U.S.C. 7201 (R. 1-8, 709-710, 764-765).[1]

At the commencement of the trial, the district court was advised that petitioner would offer expert

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[1] "R." references are to the three-volume clerk's file certified by the district court clerk. "Tr." references are to the court reporter's transcript of testimony and proceedings in the district court.

testimony of psychiatrists who had interviewed him to support his defense of mental incapacity to commit the offenses charged. Upon motion of the government, the district court thereupon issued orders appointing two additional psychiatrists (Drs. Alvin E. Davis and Harold C. Deering) to examine petitioner and to submit reports bearing on the issue of mental responsibility.[2] The orders (R. 501-502, 511-512) required petitioner to supply such information as would be required by the psychiatrists to conduct the examination, and the orders further provided in part as follows:

> * * * such examination shall not be in the presence of any counsel or stenographer designated by defendant. If defendant does not comply with this order he shall be precluded at trial from presenting testimony upon the issue of his alleged mental incapacity by any expert by whom he has been interviewed.

Copies of the indictments were attached to the orders for the information of the psychiatrists, and Drs. Davis and Deering, as well as other psychiatrists called by petitioner, testified that petitioner's attorneys and the prosecutor furnished them with miscellaneous other documents, such as the opening statements, psychological and psychiatric testing and interview reports, and other records and information

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[2] The district court had previously entered an order appointing Dr. Davis to examine petitioner for the purpose of determining mental competency to stand trial (R. 455).

(Tr. 1558, 1626, 1663, 2235, 2247, 2305, 2345-2355).[3]

On direct examination, the psychiatrists (including Dr. Davis) called by petitioner to testify that he did not possess mental capacity to commit the charged offenses related, *inter alia*, petitioner's narration of his tax problems and his assertions that his conduct was lawful and legitimate (Tr. 2309-2310). The psychiatrist (Dr. Deering) called by the government to testify that petitioner did possess mental capacity to conform his conduct to legal requirements, did not testify on direct examination to any statement by petitioner of an incriminating nature (Tr. 2223-2242).

In addition to the testimony of Dr. Deering, there was testimony by lay witnesses that they had dealings with petitioner during the period when the charged offenses were committed and that they had then considered him sane. The evidence showed that petitioner had been able to conduct complex business transactions during this time, which was further indication of mental capacity. The evidence also established a consistent pattern of filing fraudulent returns, and, as the court of appeals noted, the "overwhelming evidence support[ed] the Government's contentions" that petitioner caused a false deduction of $709,963 to be taken on P.S.P.'s 1964 tax return for

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[3] In response to a request by petitioner's counsel, the prosecutor informed the court that he had given Dr. Deering reports of the examinations by other psychiatrists. He also furnished a copy of the government's opening jury statement (Tr. 1470-1471, 1577, 2235, 2242-2244, 2247, 2281).

a fictitious management fee to petitioner, and that he also caused a false deduction of $900,000 to be taken on P.S.P.'s 1965 tax return for a fictitious forfeiture of a land contract deposit (Pet. App. A, 1-3).

The court of appeals affirmed, holding that the district court's orders appointing psychiatrists were within its statutory and inherent powers and did not compel petitioner to incriminate himself in violation of the Fifth Amendment or deprive him of the assistance of counsel in violation of the Sixth Amendment (Pet. App. A, 3-5).

ARGUMENT

1. Relying on *United States* v. *Wade*, 388 U.S. 218, petitioner contends (Pet. 9-31) that the district court's order prohibiting counsel from attending the psychiatric examination constituted a denial of his Sixth Amendment right to counsel. This argument has now been considered and rejected by several courts of appeals. *United States* v. *Albright*, 388 F.2d 719 (C.A. 4); *United States ex rel. Wax* v. *Pate*, 409 F.2d 498 (C.A. 7), certiorari denied, 396 U.S. 830; *United States* v. *Baird*, 414 F.2d 700 (C.A. 2), certiorari denied, 396 U.S. 1005; *United States* v. *Smith*, 436 F.2d 787 (C.A. 5). Although there are contrary dicta in *Thornton* v. *Corcoran*, 407 F.2d 695 (C.A. D.C.), there is in fact no conflict among the courts of appeals on this issue and it warrants no further review by this Court.

The factors viewed in *Wade* as requiring the presence of counsel at police lineups are not applicable

to psychiatric examinations. In *Wade*, this Court was concerned with the possibility of improper suggestion or other conditions at the lineup prejudicial to a suspect and with the defendant's inability to reconstruct such unfairness at trial. Noting that "[n]o substantial countervailing policy considerations have been advanced against the requirement of the presence of counsel" (*Wade*, 388 U.S. at 237), the Court concluded (*id.* at 236-237):

> Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution * * *. [Footnote omitted.]

The dangers of improper police suggestion or other prejudicial conditions do not similarly exist in an examination undertaken by an independent psychiatrist. Moreover, effective cross-examination of psychiatric testimony does not depend upon presence of counsel at the interview between psychiatrist and defendant but rather upon a knowledge of the techniques and principles of psychiatry. As this Court has noted in connection with other forms of scientific analysis, the "variables in techniques [are] few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-ex-

amination of the Government's expert witnesses and the presentation of the evidence of his own experts." *Wade, supra,* at 227-228.

Petitioner here suffered none of the disabilities found controlling in *Wade.* He was represented by able counsel who had extensive experience with medical and psychiatric defenses, and he presented in his defense the testimony of four psychiatrists and a psychologist. Furthermore, the trial court ordered that petitioner receive a copy of any report prepared by the court-appointed psychiatrists. Under these circumstances, it cannot be said that absence of petitioner's counsel at the psychiatric interview deprived petitioner of effective legal representation.

Moreover, there are strong countervailing reasons for denying a defendant the company of counsel at a psychiatric interview. Unlike a lineup, the psychiatric examination is a sensitive diagnostic process which requires privacy and a non-adversary atmosphere in which communications may be freely exchanged. This diagnostic process would be adversely affected, and the associational dialogue between defendant and psychiatrist would be seriously inhibited, by the presence of any third party, and especially by the presence of counsel.

2. Petitioner also contends (Pet. 37-43) that the order conditioning petitioner's use of expert psychiatric testimony at trial on his submission to a psychiatric examination violated his privilege against

self-incrimination.[4] This argument rests upon the proposition that the privilege against self-incrimination itself extends to psychiatric interviews. This proposition has frequently been rejected by the courts of appeals. *United States* v. *Baird*, 414 F.2d 700 (C.A. 2), certiorari denied, 396 U.S. 1005; *United States* v. *Bohle*, 445 F.2d 54 (C.A. 7); *Albright* v. *United States*, 388 F.2d 719 (C.A. 4); *Pope* v. *United States*, 372 F.2d 710 (C.A. 8), vacated and remanded on other grounds, 392 U.S. 651. There appears to be no conflict among the courts of appeals on this issue and it warrants no further review by this Court.

A defendant's statements to an examining psychiatrist do not in themselves constitute incriminatory communication or testimony within the protection of the privilege. Cf. *Schmerber* v. *California*, 384 U.S. 757; *California* v. *Byers*, 402 U.S. 424. And introduction, over the defendant's valid objection, of any such statements into evidence is, as the court of appeals below noted, strictly prohibited (Pet. App. A, 5).

Furthermore, the district court's order was a narrow and reasonable restriction on petitioner's ability to adduce expert testimony in his defense. As the Second Circuit stated in *United States* v. *Baird*, *supra*, at 708-709:

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[4] Petitioner also argues (Pet. 32-36) that the order deprived him of due process and "fundamental fairness." However, this argument appears in substance to be merely a restatement of petitioner's other arguments under the Fifth and Sixth Amendments.

> [W]here * * * the defendant puts in evidence the opinion testimony of his expert, the Government has the right to have its expert examine the accused to put in evidence his opinion testimony in rebuttal and * * * the exercise of such right by the Government does not infringe the defendant's right against self-incrimination. * * * [A] defendant who raises a defense based on criminal responsibility is estopped from making an effective objection to the Government's proceeding in this fashion * * *.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1972.

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